No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Petitioner*

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINIONS BELOW

The findings of fact, conclusions of law and order of the United States District Court for the Eastern District of Virginia are not reported (R. 26-27). The opinion of the Court of Appeals (R. 43-44) is reported at 224 F. 2d 443.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955 (R. 45). On October 7, 1955, the time for filing a petition for a writ of certiorari was

extended by the Chief Justice to and including December 11, 1955 (R. 45). The petition was filed on December 9, 1955, and was granted on January 23, 1956 (R. 46). 350 U.S. 953. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16(3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded the granting of the Government's motion for referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether a challenge to the reasonableness of a tariff rate, as applied in the prevailing circumstances, presents an administrative question calling for resolution by the Interstate Commerce Commission.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 1, *et seq.* are set out in the Appendix, *infra*, pp. 17-19.

STATEMENT

This action was brought against the United States in the district court by respondent Chesapeake & Ohio Railway Company under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346(a)(2), to recover sums

purportedly owing it in connection with the transportation of certain Government property (R. 1). The pertinent facts are undisputed and may be summarized as follows:[1]

Between December 10, 1941, and January 31, 1942, the United States shipped from Pontiac, Michigan, under Government bills of lading, fifty carloads of chassis, seat cabs, and bodies (R. 23). The freight was consigned to China Defense Supplies, Inc.,[2] at Newport News, Virginia (R. 19, 23). Notations on each of the bills of lading indicated that the shipments were authorized by the War Department, and that the goods involved were the military property of the United States, were moving for a military use, and were intended for exportation to the Republic of China pursuant to the provisions of the Lend Lease Act of March 11, 1941, 55 Stat. 31; 22 U.S.C. 411 *et seq.* (R. 24; Pet. App. 26-17). It was the bona fide intent of the Government to forward the property from Newport News, in ocean vessels, to the Republic of China via the port of Rangoon, Burma (R. 23-24).

Each of the bills of lading also contained symbols indicating that releases had been obtained on the cov-

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[1] In part, these undisputed facts appear in the findings of the same district judge in an earlier companion action involving shipments made under almost identical circumstances. See pp. 6-8, *infra*. These findings are set forth in the Appendix to the Government's petition for certiorari in this case at pp. 26-32 (referred to as "(Pet. App.")).

[2] China Defense Supplies was an American corporation which acted as the representative of the Chinese government for the acquisition of military supplies from the United States under the Lend Lease Act (Pet. App. 27).

ered shipments (Pet. App. 27). The Chief of Transportation of the War Department, in cooperation with the Maritime Commission, supervised a system for facilitating export shipments of military supplies; this was done by coordinating domestic transportation to coastal ports with the overseas transportation from such ports (Pet. App. 27).[3] The transportation officers of the War Department were not permitted to issue bills of lading without first obtaining a release covering the particular shipment, such release being issued with the view of limiting the tonnage scheduled to go to a particular port to the capacity of that port for prompt shipment (Pet. App. 27-28). The reference in each bill of lading here to a release indicated that arrangements had been made, prior to shipment, for

[3] Pursuant to the Act of June 6, 1941, c. 174, 55 Stat. 242, as implemented by Executive Order 8771, June 6, 1941 (6 F.R. 2759), and the Act of July 14, 1941, c. 297, 55 Stat. 591, the Maritime Commission had requisitioned foreign merchant vessels in American waters and chartered all American vessels for operation consistent with the needs of national defense (Pet. App. 28). Priorities were issued with respect to the loading, fueling, and repairing of vessels on the basis of those needs (Pet. App. 28). Subsequently, the Office of Defense Transportation was created to direct and coordinate transportation activities with a view to obtaining maximum utilization of existing facilities. Executive Order 8989, December 18, 1941 (6 F.R. 6725; Pet. App. 28). On February 7, 1942, by Executve Order 9054 (7 F.R. 837), the War Shipping Administration was created, and the functions of the Maritime Commission in respect to the operation, charter, and requisition of merchant vessels were transferred to it (Pet. App. 29). The Executive Order specifically provided that the vessels under WSA control were to constitute a pool to be allocated by the Administrator for use by the Army, Navy, other federal agencies, and the Governments of the Allied Nations, in compliance with strategic military requirements (Pet. App. 29).

the coordinated movement of the goods from Pontiac, Michigan, to Newport News and for export thereafter from Newport News to China, via Rangoon (Pet. App. 28).

Upon the arrival of the goods covered by the bills of lading at Newport News, delivery was made to the consignee and the goods were unloaded onto a Government-controlled pier (R. 23). On March 8, 1942, the port of Rangoon fell to the Japanese military forces (R. 24). This cut off all available routes for exportation of the goods from the United States to China (Pet. App. 30). As a result, the intended exportation could not be consummated and the carloads were reshipped to storage centers maintained by the War Department (R. 19-20, 24).

The carrier submitted bills for its transportation services from Pontiac to Newport News based upon the established *domestic* rate published in Central Freight Association, Freight Tariff No. 490-A (R. 24). These bills were paid (R. 24). However, upon the subsequent audit of the payment vouchers by the General Accounting Office, the charges were recomputed at the lower *export* rate published in Central Freight Association, Freight Tariff No. 218-M, I.C.C. No. 3422 (R. 24). The Government thereafter recovered the difference between the two sums by deducting it from amounts due the carrier in connection with other transportation services performed by it (R. 24).[4]

[4] This procedure is expressly authorized by Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66. See our brief in *United States* v. *Western Pacific Railroad*, No. 18, this Term, pp. 19-20, 40-41.

On March 18, 1952, respondent brought this action in the district court to recover the amount of the deduction (R. 1). By stipulation, the proceedings were held in abeyance pending final judgment in Civil Action 1268, instituted by respondent on December 29, 1950 (R. 21). That action involved twenty-four carloads of similar automotive equipment shipped in December 1941 and January 1942 from Pontiac to Newport News for exportation to China via Rangoon (Pet. App. 26, 30-31). Like the shipments here involved, their intended exportation was frustrated by the Japanese occupation of Rangoon, whereupon the goods were reshipped to storage centers maintained by the War Department (Pet. App. 30). As here, respondent charged and collected the domestic rate and, after administrative set-off by the General Accounting Office based upon application of the export rate, brought suit (Pet. App. 30-31).

At the trial in Civil Action 1268, respondent advanced the theory that the export rate applied solely in circumstances where exportation actually took place from the consignment port. In support of this theory, it relied exclusively on the literal language of Item No. 23030 of Tariff No. 218-M, which read (R. 42):

> APPLICATION OF EXPORT RATES TO NORTH ATLANTIC SEABOARD PORTS OF EXPORT
>
> The rates named in this tariff, or as same may be amended, and designated as "Export Rates" will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the

port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given.

The Government's position in No. 1268 was that, whether this Item 23030 rendered the domestic rate applicable as a matter of tariff construction or not, the Interstate Commerce Commission had ruled, in virtually identical circumstances, that it would be unreasonable to apply the domestic rate, and that these rulings should be followed. The district court held, however, that, since there was no showing of actual exportation, the domestic rate was applicable and that the reasonableness of that rate was to be conclusively presumed (Pet. App. 32-33). Judgment was accordingly entered for respondent.

On appeal of that case, the Government renewed the position it took in the district court and urged, in the alternative, that if the lower court had been in doubt as to the applicability of the Commission's rulings relied upon by the Government, it should have stayed the proceeding *sua sponte* and referred the question of reasonableness to the Commission. The court of appeals rejected both contentions and affirmed the judgment. *United States* v. *Chesapeake & Ohio Ry. Co.*, 215 F. 2d 213. Respecting the application of the tariffs, the court read the relevant Commission decisions as governing solely those situations

where, subsequent to the frustration of the intended exportation, the shipper made an effort to export the goods elsewhere. As to the matter of referral to the Commission "for an adjudication of the reasonableness of the domestic rate as applied to these shipments under the circumstances here appearing," the court held that the Government's failure to request the district court to take such action provided a "sufficient answer" (215 F. 2d at 216). It went on to suggest additionally that, since the Government's time for instituting an independent reparations proceeding before the Commission had run, the district court would have abused its discretion had it stayed the proceedings to enable the question of reasonableness to be presented to the Commission.

Subsequent to that decision of the court of appeals, a pre-trial conference was held in the case now here (R. 22). At that conference, the Government moved to refer to the Interstate Commerce Commission the question whether "the domestic tariff rate involved in this proceeding is reasonable if it should be determined that the shipment involved, or any part thereof, was subsequently exported" (R. 22).[5] In its pre-trial order, the court denied the motion and ruled that the issue to be litigated was whether the ultimate exportation of the shipments would render the export rate applicable (R. 22-23, 28). Holding in effect that such exportation was immaterial, the district court

[5] In view of the stipulation and final judgment in Civil Action 1268 (R. 21; see p. 7, *supra*), the Government did not challenge the applicability of the domestic rate to those shipments which were not eventually exported.

later rejected an offer of proof that a substantial majority of the shipments involved had been transported from the War Department storage centers to California ports from which they were exported to India in June 1943 (R. 24, 27, 30, 42A). The court then awarded judgment to respondent in the amount of $9,571.36 (R. 27, 41).

The court of appeals affirmed in a *per curiam* opinion (R. 43-44). In response to the Government's contention that, at the least, the Commission decisions relied upon established the unreasonableness of applying the domestic rate to those shipments encompassed by the offer of proof, the court held that the fact of subsequent exportation made no difference (R. 44). In relation to the motion for referral to the Commission, the court stated (R. 44):

> [T]he motion was properly denied. The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide. There were before the court no such administrative questions as were involved in *United States* v. *Kansas City Sou. R. Co.*, 8 Cir. 217 F. 2d 763, upon which appellant relies. Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings

which the Commission is without power to entertain.

SUMMARY OF ARGUMENT

I

As in the *Western Pacific* case (No. 18, this Term), the court below was of the view that the expiration of the two-year limitation period stated in Section 16(3) of the Interstate Commerce Act, while not barring the carrier's action against the United States, nevertheless deprived the Government of its right to have an issue of reasonableness referred to the Interstate Commerce Commission, concededly the only body empowered to pass on such an issue. This view is erroneous, we believe, for the reasons developed in our *Western Pacific* brief (pp. 12-27).

II

The court of appeals also erred in its holding that there were no questions before the district court which were administrative in character. The Government's consistent position throughout this litigation has been that it is unreasonable to charge the domestic, rather than the export, rate on traffic destined for overseas exportation, where the freight is not in fact exported from the original port of exportation solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port. "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. In numerous recent cases, indistinguishable on their facts,

the Commission has treated the question of the reasonableness of applying the domestic rate as one appropriate for its determination. And in circumstances analogous to those presented here, it has consistently ruled that the lower export rate must be applied

ARGUMENT

I.

The Two-Year Limitation Period of Section 16(3) of the Interstate Commerce Act Does Not Bar Referral of the "Reasonableness" Question to the Interstate Commerce Commission.

Here, as in *Western Pacific* (No. 18, this Term), the court below was of the view that the expiration of the two-year limitation period, while not barring the carrier's action against the United States,[6] nevertheless prevented a referral to the Interstate Commerce Commission of the question of the reasonableness of applying the domestic rates (R. 44). We believe that in so holding the court below erred. We respectfully refer the Court to our *Western Pacific* brief (pp. 12-27) for our argument on this aspect of the case.

[6] All of the shipments in question were made in December 1941 and January 1942 (R. 3-7, 23). The carrier was paid promptly on the basis of the higher domestic rates (R. 24). On post-audit, however, the difference between that rate and the lower export rate was deducted from the amounts due the carrier on other transportation services (R. 24). All of these deductions were made no later than the summer of 1946 (R. 3, 16-18). Suit was filed by the carrier in the district court almost six years later, on March 10, 1952 (R. 1).

II.

The Government's Challenge to the Reasonableness of the Domestic Rate as Applied to the Present Shipments Raised an Administrative Question Calling for Resolution by the Interstate Commerce Commission.

Equally erroneous, we believe, is the further holding below that there were no questions before the district court calling for resolution by the Interstate Commerce Commission. Underlying this holding is the court's statement that the reasonableness of the domestic tariff rate was not in issue and that the sole question was whether that rate, or the lower export rate, was applicable (R. 44). By this, the court below apparently meant that the Government did not assert that the domestic rate was unreasonable *per se*, *i.e.*, that it could not be lawfully applied in any circumstances to shipments of automotive parts moving between Pontiac and Newport News. For plainly no concession was made that the domestic rate was reasonable as applied to the shipments here involved. To the contrary, as is borne out by the motion for referral to the Commission (R. 22), the Government's uniform position below was this:—It is unreasonable to charge the domestic rate on traffic which is destined for exportation at the time of rail movement, when the freight is not in fact exported from the consignment port solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port.[7]

[7] The court of appeals' opinion in the earlier case (*United States* v. *Chesapeake & Ohio Ry. Co.*, 215 F. 2d 213) dispels any doubt that the court correctly understood the Government's position. The court there stated (215 F. 2d at 216): "The government contends that the court below should have stayed the pro-

It is, of course, true that the ultimate disposition of the litigation is dependent upon a determination as to which of two rates is to be applied. But this determination hinges upon considerations of reasonableness rather than upon a construction of the terms of the respective tariffs. And, contrary to the seeming belief of the court below, whether examined from the standpoint of the prohibition against unreasonable charges contained in Section 1(5) of the Interstate Commerce Act (App., *infra*, p. 17), or of the prohibition against unreasonable practices set forth in Section 1(6) (App., *infra*, pp. 17-18), the matter is one within the exclusive province of the Commission. As this Court has observed, reiterating the rule in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291, "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." See *Pennsylvania R.R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 196; *Mitchell Coal Co.* v. *Pennsylvania R.R. Co.*, 230 U.S. 247, 255-261; *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 147; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 432.

In adhering to this settled rule, the lower courts consistently have recognized that questions of reasonableness, such as the one presented here, necessitate Commission resolution. Indeed, even in the *Western Pacific* case (No. 18, this Term), the Court of Claims,

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ceedings and referred the case to the Interstate Commerce Commission *for an adjudication of the reasonableness of the domestic rate as applied to these shipments* * * *." [Emphasis added.]

while refusing to refer because of the expiration of the two-year period, fully recognized that the question of the reasonableness of applying particular rates was a matter appropriate for Commission determination and explicitly noted the "Government's right to have the reasonableness determined" by the Commission. 132 C. Cls. 115, 116. Similarly, in *Reconstruction Finance Corp.* v. *Spokane, P. & S. Ry. Co.*, 170 F. 2d 96 (C.A. 9), the issue was which of two tariff rates applied to certain shipments of tax-free Government alcohol. While the shipper did not contend that the rate charged by the carrier was unreasonable *per se*, its expert witnesses suggested that, because of the character of the shipments, the carrier could not collect that rate on their movement without contravening the reasonableness provisions of the governing Act. The Ninth Circuit refused to consider this suggestion, holding on the authority of *Pennsylvania R.R. Co.* v. *International Coal Mining Co., supra*, that it must be addressed to the Commission (170 F. 2d at 98). See, also, *Union Pacific Ry Co.* v. *United States*, 125 C. Cls. 390, 394.

There certainly can be no doubt that the Commission itself believes that questions of the precise kind involved here come within its special competence. On at least five occasions since the beginning of World War II, the Commission has exercised its jurisdiction to determine whether the domestic rate may be applied in situations where exportation from the consignment port has not taken place, or some other condition precedent set forth in the established export tariff had not been met, because of intervening war

conditions. *C. B. Fox Co.* v. *Gulf, Mobile & Ohio Ry. Co.*, 246 I.C.C. 561; *River Petroleum Corp.* v. *Yazoo & M. V. R. Co.*, 258 I.C.C. 1; *Mid-Continent Petroleum Corp.* v. *Illinois Central R. Co.*, 258 I.C.C. 422; *Products-From-Sweden, Inc.* v. *Lehigh Valley R. Co.*, 263 I.C.C. 760; *General Carloading Co., Inc.* v. *Baltimore & Ohio R. Co.*, 266 I.C.C. 243. In each of the cited cases, the Commission held that the application of the domestic rate was unjust and unreasonable, and it awarded reparations. As the Commission put it in *Products-From-Sweden, Inc.* v. *Lehigh Valley R. Co.*, *supra*, citing its earlier *Fox* and *Mid-Continent Petroleum* decisions (263 I.C.C. at 763):

> Complainant made the shipments under consideration in good faith, with the understanding that the export rate would be protected. Exportation of the shipments through the port of New York, as originally intended, was prevented by extraordinary conditions caused by the war, conditions clearly beyond the control of the parties. Moreover, the subsequently published tariff provisions, which permit the application of export rates to similar shipments, are entitled to consideration, although they may not be applied retroactively. In view of these circumstances, we are of the opinion that *application of the domestic rates on these shipments would be unreasonable.* [Emphasis added.]

We submit that the Commission's decisions are correct and that the question of which rate applies to "frustrated" export traffic is one involving considerations of reasonableness alone. It follows that the

courts below should not have determined that question but should have directed a referral to the Commission as the only body empowered to make such a determination.

CONCLUSION

For the reasons stated in this brief and in the Government's brief in *United States* v. *Western Pacific R. Co.* (No. 18, this Term), it is respectfully submitted that the judgment below should be reversed.

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AUGUST 1956

APPENDIX

The relevant provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et. seq.*, are as follows:

Section 1(5) [49 U.S.C. 1(5)]:

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * *

Section 1(6) [49 U.S.C. 1(6)]:

It is made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and

unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 16(3) [49 U.S.C. 16(3)]:

(a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time

such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

* * * *